No. 89-1104

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In the Supreme Court of the United States

OCTOBER TERM, 1989

ALCAN FOIL PRODUCTS DIVISION OF ALCAN ALUMINUM CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a four-month time limit governs the Environmental Protection Agency's (EPA's) review of proposed revisions to State Implementation Plans (SIPs) under the Clean Air Act, 42 U.S.C. 7410(a)(3)(A).

2. Whether, if such a time limit is applicable, the proper remedy for EPA failure to take final action on a SIP revision within four months is to bar the United States from enforcing an existing SIP until EPA issues a final decision on the proposed revision.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Blum v. *Bacon*, 457 U.S. 132 (1982)	8
Brock v. *Pierce County*, 476 U.S. 253 (1986)	7, 9
Dayton Board of Education v. *Brinkman*, 433 U.S. 406 (1977)	8
Thigpen v. *Roberts*, 468 U.S. 27 (1984)	8
United States v. *General Motors Corporation*, 876 F.2d 1060 (1st Cir. 1989), cert. granted, No. 89-369 (Dec. 4, 1989)	7
Washington v. *Yakima Indian Nation*, 439 U.S. 463 (1979)	8

Statutes and rule:

Clean Air Act, 42 U.S.C. 7401 *et seq.*:	
§ 108, 42 U.S.C. 7408	2
§ 109, 42 U.S.C. 7409	2
§ 110(a)(1), 42 U.S.C. 7410(a)(1)	2
§ 110(a)(2), 42 U.S.C. 7410(a)(2)	2
§ 110(a)(2)(A), 42 U.S.C. 7410(a)(2)(A)	3
§ 110(a)(3)(A), 42 U.S.C. 7410(a)(3)(A)	3
§ 110(a)(2)(A)-(K), 42 U.S.C. 7410(a)(2)(A)-(K)	2
§ 110(d), 42 U.S.C. 7410(d)	3
§ 113, 42 U.S.C. 7413	3, 9
§ 113(a), 42 U.S.C. 7413(a)	3, 5
§ 113(b), 42 U.S.C. 7413(b)	2, 3, 5, 7
§ 120, 42 U.S.C. 7420	3
§ 120(d)(2), 42 U.S.C. 7420(d)(2)	3

Statutes and rule—Continued: Page

§ 120(d)(3)(C), 42 U.S.C. 7420(d)(3)(C) 9
§ 172(a)(2), 42 U.S.C. 7502(a)(2) 4
§ 304, 42 U.S.C. 7604 ..... 3, 6
Fed. R. Civ. P. 56(f) 6

Miscellaneous:

53 Fed. Reg. 40,745 (1989) 5
54 Fed. Reg. 10,982 (1989) 5
55 Fed. Reg. 2842 (1990) 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 889 F.2d 1513. The opinions of the district court (Pet. App. A23-A30, A34-A42) are reported at 694 F. Supp. 1280.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1989. The petition for a writ of certiorari was filed on January 17, 1990. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from a civil enforcement action pursuant to Section 113(b) of the Clean Air Act, 42 U.S.C. 7413(b), asserting that emissions of volatile organic compounds (VOCs) from petitioner's plant violated emission limits set forth in the Kentucky state implementation plan (SIP). The case presents the questions whether a four-month time limit governs EPA's review of proposed revisions to SIPs, and, if it does, whether the United States is barred, when EPA fails to meet that deadline, from bringing or continuing an enforcement action against a source of air pollution for violating the terms of the existing SIP. Those questions are currently pending before the Court in *General Motors Corporation* v. *United States*, No. 89-369 (argued Mar. 21, 1990).

1. Under the Clean Air Act, EPA is responsible for establishing National Ambient Air Quality Standards (NAAQS) for pollutants which cause or contribute to air pollution. §§ 108, 109, 42 U.S.C. 7408, 7409. Section 110(a)(1) of the Act requires each State to develop and submit to EPA for approval, within nine months after the promulgation of NAAQS, a state implementation plan designed to achieve and maintain the NAAQS within the State. 42 U.S.C. 7410(a)(1). Section 110(a)(2) expressly requires EPA, within four months after receiving the original SIP, to determine whether it meets the statutory requirements set forth in subsection (a)(2)(A)-(K). 42 U.S.C. 7410(a)(2). Those provisions require, *inter alia*, that the SIP provide for attainment of applicable primary NAAQS "as expeditiously as practicable" but in no event later than

three years from the date of approval of the SIP. 42 U.S.C. 7410(a)(2)(A).

Section 110(a)(3)(A) requires EPA to approve revisions to existing SIPs if it determines that the revised SIP meets the requirements applicable to original SIPs, and that the revision was adopted by the State after notice and public hearings. 42 U.S.C. 7410(a)(3)(A). This subsection of the Act contains no express time requirement for acting on revisions. Once approved by EPA, an original or revised SIP is enforceable civilly or criminally by either the State or federal government, or, in the absence of government enforcement, by private citizens civilly. 42 U.S.C. 7410(d), 7413, 7604.

Section 113(a) of the Act authorizes EPA to issue a notice to any person who is violating a SIP, and, if the violation continues beyond 30 days after notice, to enforce the SIP by issuing an administrative order or instituting a district court civil action. 42 U.S.C. 7413(a). EPA may seek civil penalties of up to $25,000 per day, and in determining the amount of a civil penalty, the district court is directed to "take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." 42 U.S.C. 7413(b).[1]

2. This enforcement action concerns emissions at petitioner's laminating plant in Louisville, Kentucky, which manufactures cigarette package foil liners,

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[1] An additional means of enforcement is provided in Section 120 (42 U.S.C. 7420), which authorizes EPA to administratively assess a noncompliance penalty against any major stationary source in violation of SIP emission limits. The penalty begins to accrue when EPA issues a Notice of Noncompliance, and is intended to remove the economic benefit of delayed compliance. See 42 U.S.C. 7420(d)(2).

electric cable wrap, and other products. Pet. App. A24. As part of this process, petitioner operates rotogravure printing presses which emit or have the potential to emit VOCs, which, in turn, react with other chemicals in the atmosphere to form ozone. *Id.* at A2, A25. Petitioner's facility must meet the requirements of Regulation 6.29 of the Jefferson County Air Pollution Control District (the Region), approved as part of the federally-enforceable Kentucky SIP. *Id.* at A4. The Regulation requires that each separate emission source—in this case, each rotogravure press—must comply with the established VOC emission limitations. *Ibid.*

On March 3, 1986, Kentucky submitted to EPA, on behalf of the Region, a proposed revision to the Kentucky SIP which would have allowed petitioner to demonstrate compliance through the utilization of an average of VOC emissions, over a 30-day period, from all point sources of the facility considered together—a method known as the "bubble concept." Pet. App. A5. Following initial review, EPA advised the Region, by letter dated May 22, 1986, that the proposed "bubble" plan was deficient, and EPA requested additional documentation demonstrating, among other matters, that the use of long-term averaging would not jeopardize attainment of the ambient air quality standard. Gov't C.A. Br. 6.[2] Following review of the Region's further submission, EPA advised the Region on July 7, 1986, that the proposed bubble was still deficient, and that petitioner "would be out of compliance, even if the 30-

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[2] The applicable deadline for achieving compliance with the relevant ozone NAAQS is "as expeditiously as practicable but not later than December 31, 1987." 42 U.S.C. 7502(a)(2).

day averaging time was granted." Pet. App. A5; Gov't C.A. Br. 6-7.

On July 14, 1986, EPA issued a Notice of Violation to petitioner stating that seven rotogravure machines were not in compliance with Regulation 6.29, and that failure to achieve compliance could result in an administrative compliance order pursuant to Section 113(a) of the Clean Air Act (42 U.S.C. 7413 (a)), or judicial action pursuant to Section 113(b) (42 U.S.C. 7413(b)). Pet. App. A6, A25; Gov't C.A. Br. 7. After additional discussions failed to resolve the matter, the United States filed suit on July 15, 1987, under Section 113(b) of the Clean Air Act, alleging that petitioner was in violation of the Act and of the Kentucky SIP. Pet. App. A6; Gov't C.A. Br. 8. The complaint sought an injunction requiring petitioner to comply with the Kentucky SIP, and requested civil penalties of $25,000 per day of violation. Gov't C.A. Br. 8-9.

On August 26, 1987, EPA's Regional Administrator recommended to EPA Headquarters that the proposed Alcan "bubble" SIP revision be disapproved. Pet. App. A26. On October 18, 1988, EPA published a proposed rule disapproving the SIP revision (53 Fed. Reg. 40,745); on March 16, 1989, EPA published a final rule disapproving the revision (54 Fed. Reg. 10,982).[3]

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[3] The State submitted another SIP "bubble" revision on petitioner's behalf on July 28, 1989; among other changes from the SIP proposal here, it utilizes a daily rather than a 30-day averaging period. 55 Fed. Reg. 2842 (Jan. 29, 1990). EPA published a proposed rule approving that SIP revision, referred to by petitioner as "SIP III" (Pet. 9), on January 29, 1990. 55 Fed. Reg. 2842. The so-called "SIP I" (Pet. 8) refers to a SIP revision submitted by the State in 1982 covering many aspects of the SIP, including a generic "bubble" pro-

2. On March 15, 1988, the district court granted petitioner's motion for summary judgment, ruling that "since EPA's notice of noncompliance was served more that four (4) months after the [Region] submitted its proposed []SIP revision [the EPA] may not commence enforcement proceedings until it acts upon the proposed revision." Pet. App. A28. On September 15, 1988, the district court denied reconsideration; the court stated that questions concerning the assessment of penalties in a subsequent enforcement action would not be ripe until EPA acted on the proposed revision, and that the issue "ought to depend on the equities of each individual case." Pet. App. A40. Both in its original decision and in its decision denying the motion for reconsideration, the court denied the United States' motion, pursuant to Fed. R. Civ. P. 56(f), for a continuance to allow discovery concerning whether petitioner was in compliance with the proposed SIP revision; the court stated that "the present action is not based on noncompliance with the *revised* SIP," and that the possibility of such noncompliance is "immaterial to the present action." Pet. App. A41. See also *id.* at A28.[4]

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posal. In 1986, the Region filed suit, pursuant to the citizen suit provision of the Act (42 U.S.C. 7604), to compel EPA action on that proposal, but the court and the parties focused on this enforcement action instead. See Pet. App. A15.

[4] Petitioner's suggestion (Pet. 10 n.3) that the district court made a "conclusive determination" of petitioner's compliance with the proposed SIP is incorrect. The district court expressly declined to make any findings of fact on this question as "essentially unnecessary to this action" (Pet. App. A30; see also *id.* at A41). EPA continues to assert, as it has throughout this litigation, that petitioner's facility complies neither with the existing Kentucky SIP (a contention petitioner has never disputed), or with the proposed SIP revision (see *id.* at A27-A28).

3. On November 21, 1989, the court of appeals reversed and remanded, directing the district court to reinstate the United States' enforcement action. Pet. App. A17. The court agreed with the district court that the four-month deadline explicitly imposed by the Act on EPA's review of original SIPs should also apply to the review of SIP revisions. *Id.* at A6-A10. Relying on this Court's decision in *Brock* v. *Pierce County*, 476 U.S. 253 (1986), however, the court held that "[c]learly remedies less drastic th[a]n dismissal are available for EPA's failure to act within four months." Pet. App. A15. The court found that the "most effective remedy" was that emphasized by the First Circuit in *United States* v. *General Motors Corporation*, 876 F.2d 1060 (1989), cert. granted, No. 89-369 (Dec. 4, 1989) and provided by Section 113(b) of the Clean Air Act itself—granting the district court discretion to adjust the penalties for noncompliance and to balance such factors as the prejudice to the violator and EPA's reasons for delay. Pet. App. A15-A16. The court observed that, "[i]f the source does not establish that it is in compliance with the proposed revision, the court may assess penalties from the date of the notice of noncompliance." *Id.* at A16. If the source does demonstrate such compliance, the government "has the burden of justifying EPA's delay in acting on the proposal." *Ibid.* The court must then "balance the reasonableness of the delay against whatever prejudice the source is able to establish" to determine the appropriate penalty. *Ibid.*

In a concurring opinion, Judge Ryan stated that the court's emphasis on compliance with the proposed SIP "should not be read as adopting a rule for this circuit that the way for a polluter to avoid penalties for an out-and-out violation of an existing SIP is to

file a proposed revised SIP 'wish list' * * * and take comfort that the enforcement litigation will have to do with compliance with the proposed SIP and not the existing one." Pet. App. A21. Noting that EPA ultimately disapproved the proposed SIP, Judge Ryan concluded that a pollution source should not be allowed to avoid appropriate penalties for violating an existing SIP "simply because it has complied with a proposed SIP that it wished had been adopted and the agency has not adopted." *Ibid.*

ARGUMENT

1. In *General Motors Corporation* v. *United States*, No. 89-369 (argued Mar. 21, 1990), the questions presented are whether a four-month deadline applies to EPA's review of SIP revisions, and, if so, whether the Clean Air Act bars EPA from enforcing the existing SIP if the agency has not taken final action on the proposed SIP revision within four months. Because the petition presents the same legal questions that are before the Court in *General Motors*, the Court should hold the petition and dispose of it as appropriate in light of its decision in *General Motors*.

2. The court of appeals correctly reinstated the enforcement action against petitioner. Even if there is a four-month review deadline for SIP revisions,[5] the

[5] A conclusion that there is no four-month limit for final action on SIP revisions is, in our view, required by the express language, structure, and rationale of the statute (see 89-369 U.S. Br. at 14-24). We accordingly rely on the lack of a four-month deadline as an alternative ground for upholding the judgment of the court of appeals reinstating the enforcement action. See *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984); *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977).

court correctly determined, following the principles set forth by this Court in *Brock* v. *Pierce County*, 476 U.S. at 260, that regardless of the cause for delay, "the courts must apply remedies that, as nearly as possible, promote the primary purpose of the Act—improvement of the quality of the nation's air." Pet. App. A15. The court of appeals properly concluded that the "less drastic" remedy was to allow the district court, in determining an appropriate penalty, to consider both the reasonableness of the period taken by EPA for reviewing the SIP revision,[6] and, if unreasonable, any resulting prejudice to petitioner.[7]

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[6] Petitioner's statement (Pet. 11 n.4) that the court of appeals "went so far as almost determining that the EPA's delay was unreasonable" is incorrect. Petitioner's claim that EPA purposely delayed action until applicable legal requirements were altered, was raised for the first time on appeal, and is sharply disputed by EPA. The court of appeals expressly declined to resolve that issue, leaving it to the district court to resolve during the determination of penalties. Pet. App. A16-A17.

[7] As we have pointed out in our brief in *General Motors* (at 43 n.48), a copy of which has been furnished to petitioner's counsel, the court of appeals in this case erred slightly in stating, in dictum, that "the court may assess penalties from the date of the notice of noncompliance" (Pet. App. A16). That comment confuses the procedure under Section 120(d)(3)(C) of the Act, in which administrative penalties accrue only from the date of a "notice of noncompliance" (42 U.S.C. 7420(d)(3)(C)), with the procedure under Section 113, in which penalties may be assessed for noncompliance from the first day of violation.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's decision in *General Motors Corporation* v. *United States*, No. 89-369 (argued Mar. 21, 1990).

Respectfully submitted.

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